

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

\_\_\_\_\_  
IN THE MATTER OF: )

Order No. 10 -xxx –ST/ SW

Mr. Tommy E. Kelly )  
15460 John Kelly Road )  
Churchula, Alabama 36521 )  
\_\_\_\_\_ )

FINDINGS OF FACTS

Pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16, (2006 Rplc. Vol.), the Alabama Scrap Tire Environmental Quality Act Code §§ 22-40A-1 to 22-40A-24(2006 Rplc. Vol.), the Solid Wastes and Recyclable Materials Management Act (SWRMMA), Ala. Code §§ 22-27-1 to 22-27-18 (2006 Rplc. Vol. and 2009 Cum Supp.), and the ADEM Administrative Code promulgated hereunder, the Alabama Department of Environmental Management (hereinafter “ADEM” or “the Department”) makes the following finding of facts:

1. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).
2. Pursuant to Ala. Code § 22- 40A-11 (2006 Rplc. Vol.), the Department is the state agency authorized to administer and enforce the provisions of the Alabama Scrap Tire Environmental Quality Act Ala. Code §§ 22-40A-1 to 22-40A-24.
3. Ala. Code §22-40A-4(a) (2006 Rplc. Vol.) states that “No person may accumulate more than 100 scrap tires, except as a permitted processor, registered receiver, or permitted landfill.”

4. Ala. Code §22-40A-4(b) (2006 Rplc. Vol.) states the following: “No person may expose accumulated scrap tires to the elements for more than 30 days.

5. Ala. Code §22-40A-5(a) (2006 Rplc. Vol.) states that “accumulations of scrap tires for whatever purpose ... shall be removed by the person responsible for the creation or the maintenance of the accumulation, or if the person responsible is not determined, by the landowner unless the landowner is an innocent landowner ...”

6. ADEM Admin. Code r. 335-4-4-.01 (1) requires that “No person may accumulate more than 100 scrap tires, except a permitted processor, a person who registers as required required in 335-4-3-.01(2), or a permitted Solid Wasted Disposal Facility (hereinafter SWDF). No person may expose scrap tires to the elements for more than thirty days”

7. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.) and Ala. Code §§ 22-27-9 (2006 Rplc. Vol. and 2009 Cum Supp.), the Department is the state agency authorized to administer and enforce the provisions of the Solid Wastes and Recyclable Materials Management Act (SWRMMA), Ala. Code §§ 22-27-1 to 22-27-18 (2006 Rplc. Vol. and 2009 Cum Supp.).

8. Ala. Code §22-27-2(36) (2006 Rplc. Vol. and 2009 Cum. Supp.) defines an “unauthorized dump” (hereinafter “UAD”) as “any collection of solid wastes either dumped or caused to be dumped or placed on any public or private property, whether or not regularly used, and not having a permit from the Department.”

9. “Ala. Code § 22-27-4(b) (2006 Rplc. Vol. and 2009 Cum. Supp.) states the following: “The creation, contribution to, or operation of unauthorized dumps shall be

prohibited, removed, enjoined, and enforced upon and regulated as provided in this article generally, and Section 22-27-11, specifically.”

10. Ala. Code § 22-27-10(b) (2006 Rplc. Vol. and 2009 Cum. Supp.) states the following: “The creation, contribution to, or operation of an unauthorized dump is declared to be a public nuisance per se, a menace to public health, and a violation of this article.”

11. ADEM Admin. Code r. 335-13-1-.13 (1) (a) declares that open or unauthorized dumps are prohibited.

12. On June 17, 2009, Department personnel conducted an inspection and documented the existence of an unauthorized scrap tire accumulation/ unauthorized dump (hereinafter “UASTA/UAD”), located on the property of Mr. Tommy E. Kelly (hereinafter “Mr. Kelly”) at 15460 John Kelly Road within parcel R020807250000004, Chunchula, Mobile County, Alabama, The Department has determined that Mr. Kelly is responsible for the creation of the UASTA/UAD. Property ownership was determined by Mobile County records. The UASTA/UAD consisted of more than 100 scrap tires, and construction & demolition wastes.

13. On July 22, 2009, the Department issued a Notice of Deficiency (hereinafter “NOD”) to Mr. Kelly for operating an UASTA/UAD.

14. The Department did not receive a response to the July 22, 2009, NOD.

15. On October 28, 2009, the Department issued a Notice of Violation (hereinafter “NOV”) letter to Mr. Kelly requiring abatement and closure of the site and the submittal of associated documentation.

16. The Department did not receive a response to the October 28, 2009, NOV.

## **CONTENTIONS**

Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent, and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such a violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A.     SERIOUSNESS OF THE VIOLATION: Mr. Kelly did not comply with any requirements applicable to the proper management of scrap tires or solid waste disposal. The Department is unaware of any irreparable harm to the environment or any threat to the safety of the public as a result of these violations. This unauthorized accumulation of scrap tires may pose a threat to human health due to the possible presence of disease vectors.

B.     THE STANDARD OF CARE: Mr. Kelly failed to demonstrate a standard of care commensurate with applicable scrap tire management requirements and applicable solid waste disposal requirements.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department has been unable to ascertain if Mr. Kelly has realized a significant economic benefit as a result of the violations noted.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: The Department is unaware of any efforts employed by Mr. Kelly to mitigate potential effects upon the environment that may have been created as a result of UASTA/UAD.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department is unaware of previous violations of applicable scrap tire/solid waste regulations.

F. THE ABILITY TO PAY: Mr. Kelly has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: The Department has carefully considered the six statutory penalty factors enumerated in Ala. Code § 22-22A-5(18)c (2006 Rplc. Vol.), as well as the need for timely and effective enforcement, and has concluded that a civil penalty in the amount of \$5,505 is appropriate, in keeping with a penalty range imposed by the Department for similar violations at other scrap tire accumulations and UASTA/UAD, as follows (see attachment A):

| <u>Violation Type</u>                | <u>Penalty Range for Violation Type</u> |
|--------------------------------------|---|
| Unauthorized Scrap Tire Accumulation | \$100 - \$25,000                        |
| Unauthorized Solid Waste Dump        | \$100 - \$25,000                        |
| Additive Costs per Statute           | \$5 per scrap tire                      |

## ORDER

Based on the foregoing findings of fact and pursuant to Ala. Code, §§ 22-22A-5(1), 22-22A-5(10), 22-22A-5(18), 22-27-11, 22-40A-4(a), 22-40A-4(b), and 22-40A-5(a), it is hereby ordered:

A. That, not later than forty-five days after issuance of this Order, Mr. Kelly shall pay to the Department a civil penalty in the amount of \$5,505.00 for the violations cited herein. The penalty shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel  
Alabama Department of Environmental Management  
P O Box 301463  
Montgomery, Alabama 36130-1463

All checks shall reference Mr. Kelly's name and address and the ADEM Administrative Order number of this action.

B. That, immediately upon the issuance of this Order and continuing each and every day thereafter, Mr. Kelly shall cease and desist from operating an UASTA/UAD.

C. That, within thirty days of the issuance of this Order, Mr. Kelly shall submit a remediation plan to the Department in accordance with ADEM Admin. Code div. 335-4 and ADEM Admin. Code div. 335-13. This plan shall include a schedule for remediation completion. Remediation activities shall not commence until the remediation plan is approved by the Department. Mr. Kelly shall document remediation

activities by submitting the following to the Department within thirty days of remediation completion:

1. Time period in which the remediation activities occurred.
2. Total volume of scrap tires and solid waste removed from the property.
3. A copy of waste receipts documenting that all scrap tires were properly disposed of or beneficially reused in an approved manner and that all regulated waste was taken to a permitted landfill.
4. Documentation that all regulated waste was removed from the property.
5. Photographs of the site, before, during, and after remediation.

D. That the issuance of this Order does not preclude the Department from seeking criminal fines or other appropriate sanctions or relief against Mr. Kelly for the violations cited herein.

E. That failure to comply with the provisions of the Order shall constitute cause for commencement of legal action by the Department against Mr. Kelly for recovery of additional civil penalties, criminal fines, or other appropriate sanctions or relief.

ORDERED and ISSUED this \_\_\_\_ day of \_\_\_\_\_, 2010.

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Lance R. LeFleur  
Director

## CERTIFICATE OF SERVICE

I, \_\_\_\_\_, hereby certify that I have this date  
served the foregoing Administrative Order on \_\_\_\_\_  
by regular United States Mail, properly addressed and postage prepaid to:

**Mr. Tommy E. Kelly  
15460 John Kelly Road  
Churchula, Alabama 36521**

Done this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Name



# ATTACHMENT A

## Penalty Calculation Worksheet

Tommy E. Kelly  
15460 John Kelly Road  
Chunchula, AL 36521

| Violation*  | Number of Violations* | Seriousness of Violation & Base Penalty* | Standard of Care* | History of Previous Violations* |
|---|-----------------------|--|-------------------|---------------------------------|
| Operation of an Unauthorized Dump                 | 1                     | \$5,000                                  | \$0               | \$0                             |
| Unauthorized Accumulation of Scrap Tires (101 ST) | 1                     | \$505                                    | \$0               | \$0                             |
| <b>Totals:</b>                                    | 2                     | \$5,505                                  | \$0               | \$0                             |

Economic Benefit\*: \$0  
Mitigating Factors\*: \$0  
Ability to Pay\*: \$0  
Other Factors\*: \$0

**Total Civil Penalty: \$5,505**

### Footnotes

\* See the "Findings" of the Order